

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

JAMES LEE THOMAS,
Petitioner,
v.
T. GONZALEZ, Warden,
Respondent. } No. CV 11-3577-VAP (PLA)
} ORDER TO SHOW CAUSE RE: DISMISSAL
} OF SUCCESSIVE PETITION

James Lee Thomas (“petitioner”) initiated this action on April 26, 2011, by filing a Petition for Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. § 2254. The Petition challenges his 1998 California conviction in the Los Angeles County Superior Court. The Court observes that on November 27, 2001, petitioner filed an earlier habeas petition in this Court, Case No. CV 01-10151-VAP (PLA), which challenged the same conviction. The 2001 petition was dismissed on the merits with prejudice pursuant to the Judgment entered on April 5, 2004.

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1 A habeas petition is second or successive if it raises claims that were or could have been
2 adjudicated on their merits in a previous petition. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir.
3 2009); see also Cooper v. Calderon, 274 F.3d 1270, 1273 (9th Cir. 2001) (per curiam). “A
4 disposition is ‘on the merits’ if the district court either considers and rejects the claims or
5 determines that the underlying claim will not be considered by a federal court.” McNabb, 576 F.3d
6 at 1029.

7 The Antiterrorism and Effective Death Penalty Act of 1996 (“the AEDPA”) provides that a
8 claim presented in a second or successive federal habeas petition that was not presented in a
9 prior petition shall be dismissed unless:

10 (A) the applicant shows that the claim relies on a new rule of
11 constitutional law, made retroactive to cases on collateral review by
the Supreme Court, that was previously unavailable; or

12 (B)(i) the factual predicate for the claim could not have been
13 discovered previously through the exercise of due diligence; and

14 (ii) the facts underlying the claim, if proven and viewed in light of the
15 evidence as a whole, would be sufficient to establish by clear and
convincing evidence that, but for constitutional error, no reasonable
factfinder would have found the applicant guilty of the underlying
16 offense.

17 28 U.S.C. § 2244(b)(2)(A), (B).

18 Furthermore, “[b]efore a second or successive application . . . is filed in the district court,
19 the applicant shall move in the appropriate court of appeals for an order authorizing the district
20 court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

21 In his 2001 federal habeas challenge, petitioner raised the following claims: (1) his sentence
22 under California’s Three Strikes law was illegal; (2) he was entitled to an evidentiary hearing; (3)
23 his due process rights were violated by the trial court’s errors; (4) his sentence of twenty-five years
24 to life was disproportionate when compared with other punishments given in California for more
25 serious crimes, and it violated his rights to due process and a fair trial; (5) there was insufficient
26 evidence to prove that petitioner’s prior convictions qualified as strikes; and (6) petitioner’s trial
27 counsel rendered ineffective assistance for failing to challenge the classification of his prior
28 convictions as strikes. (See Report and Recommendation, entered on February 11, 2004, at p.

1 4). As mentioned above, the action was dismissed on the merits and with prejudice. (See Order
2 Adopting Magistrate Judge's Report and Recommendation and Judgment, both entered on April
3 5, 2004). Petitioner's subsequent request for a certificate of appealability was denied.

4 Because petitioner's earlier federal petition was denied on the merits, the instant Petition
5 is considered to be a second or successive application. Even if it were found that the claim raised
6 in the instant Petition satisfies 28 U.S.C. § 2244(b)(2)(A) or § 2244(b)(2)(B),¹ petitioner is still
7 required to seek authorization from the Ninth Circuit before filing a successive petition. 28 U.S.C.
8 § 2244(b)(3)(A). There is no indication in the record, however, that petitioner has obtained such
9 authorization. See Burton v. Stewart, 549 U.S. 147, 153, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007)
10 (AEDPA requires petitioner to receive authorization from the Court of Appeals before filing a
11 second habeas petition). Thus, it appears that the Court is without jurisdiction to entertain the
12 Petition. See id.; Cooper, 274 F.3d at 1274 ("When the AEDPA is in play, the district court may
13 not, in the absence of proper authorization from the court of appeals, consider a second or
14 successive habeas application.").

15 Accordingly, petitioner is **ordered to show cause** why the Petition should not be dismissed
16 as successive. Specifically, petitioner must submit to the Court **on or before May 18, 2011**,
17 documentation showing that, pursuant to 28 U.S.C. § 2244(b)(3)(A), he properly filed a motion in
18 the Ninth Circuit for an order authorizing the district court to consider a successive petition, and
19 that the Ninth Circuit issued such an order. **Failure to respond by May 18, 2011, will result in**
20 **the Petition being dismissed without prejudice.**² See Reyes v. Vaughn, 276 F.Supp.2d 1027,

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23 ¹ Petitioner asserts one ground for relief in the instant Petition: actual innocence with
24 respect to a prior conviction. (Petition at 5-6).

25 ² In the event that petitioner has not complied with 28 U.S.C. § 2244(b)(3)(A), he is advised
26 that if he wishes to make a successive habeas application, he must file a "Motion for Order
27 Authorizing District Court to Consider Second or Successive Petition Pursuant to 28 U.S.C. §
28 2244(b)(3)(A)" directly with the Ninth Circuit. Until the Ninth Circuit issues such an order, any
direct or implied request for a second or successive petition for writ of habeas corpus is barred by
§ 2244(b) and must be dismissed without prejudice to petitioner's right to seek authorization from
the Ninth Circuit.

1 1029-30 (C.D. Cal. 2003) (dismissing successive petition without prejudice to petitioner's right to
2 seek authorization from the Ninth Circuit).

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4 DATED: April 28, 2011



5 PAUL L. ABRAMS
6 UNITED STATES MAGISTRATE JUDGE
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